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IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

CAFETERIA EMPLOYEES UNION, LOCAL 302, and WILLIAM MESEVICH, Petitioners, against GUS ANGELOS, et al., Respondents.	No. 36
CAFETERIA EMPLOYEES UNION, LOCAL 302, and WILLIAM MESEVICH, Petitioners, against ELIAS TSAKIRES, et al., Respondents.	No. 37

PETITIONERS' REPLY BRIEF

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The argument for respondents as stated on counsel's brief consists of three points:

1. The judgments under review do not forbid picketing generally but only picketing with false signs.

2. The judgments under review are based upon state law which this Court has no power to review.

3. The judgments under review rest on findings of fact which this Court has no power to review.

We shall consider these points in the order stated, and then add some observations on the question not touched upon in the brief for the respondents, but which is the

really important question in the case, namely, the nature of the facts found and their relation to the constitutional question involved.

POINT I

The judgments under review are absolute prohibitions of picketing.

In view of the clear and unequivocal language of the decrees under review, it is difficult to see how anyone can claim that the prohibition of picketing is limited to picketing with false signs or qualified in any other manner. However, since this assertion is repeated several times throughout the brief for respondents, we desire to call the attention of the Court to the fact that not only is the language of the decrees under review absolute and unqualified, but that the entire discussion in the New York Court of Appeals would have been meaningless if these decrees had been construed by that court as being limited to picketing with false signs. That the minority of the court understood the decrees to prohibit all picketing, and understood the opinion of the majority of the Court of Appeals as approving decrees which prohibit all picketing, is clear from the statement of the minority in their opinion, that:

> "If the picketing described in those findings, herein quoted verbatim, is unlawful, then picketing has been absolutely and completely outlawed in this State."

Indeed, no one can come to any other conclusion, since, as already stated, a construction of the decrees under review as prohibiting only picketing with false signs would have rendered absurd the elaborate discussion of the majority of the Court of Appeals in their effort to justify the affirmance of these decrees. It must be borne in mind that Section 876-a, the non-application of which the elaborate argument of the majority of the Court of Appeals

was intended to prove, does not stand in the way of the prohibition of picketing with false signs. The paragraph of that section dealing with the subject of picketing merely provides that the injunction decree in a labor dispute must not prohibit—

> "Giving publicity to and obtaining or communicating information regarding the existence of, or the facts in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method *not involving fraud*, violence, or breach of the peace." (Emphasis supplied throughout.)
>
> *Civil Practice Act* (*New York*) Section 876-a, subd. 1, (f) (5).

It is therefore clear that the whole elaborate argument in the Court of Appeals with respect to the applicability or non-applicability of Section 876-a only became necessary because the decrees here under review prohibited, and were construed by the Court of Appeals to prohibit, *all* picketing, with *any* signs, truthful or untruthful. And anyone familiar with the New York decisions knows that the prohibition of picketing with untruthful signs is of daily occurrence in the courts of that state, notwithstanding the existence of Section 876-a. And the only time the applicability or non-applicability of that section is discussed in the reported cases, is in connection with decrees which prohibit peaceful picketing. Such, indeed, were the cases relied upon by the majority of the Court of Appeals in order to justify their conclusion that the cases here under review did not involve labor disputes, and that Section 876-a was therefore inapplicable.

The decrees under review must therefore be assumed to forbid, as their wording expressly states, *all* picketing, with *any* kind of signs, or without signs.

POINT II

The decisions under review are not based upon any construction of state law in the sense which would make the decisions not reviewable by this Court.

We must frankly confess our inability to understand the claim of counsel for the respondents, that the decisions under review turn upon a question of state law, and are therefore not reviewable by this Court. Of course, the New York Court of Appeals, like every other state court, makes its decisions on the basis of state law, either statutory or common. If the mere fact that the state court decided a point of state law were fatal to a review by this Court, this Court could never review any decision of a state court. What the rule of this Court which counsel apparently had in mind really means is, that this Court will not review a decision based on state law which made it *unnecessary* to consider the federal question, and that the federal question was therefore not passed upon.

Clearly, that is not the situation in these cases. The New York Court of Appeals was confronted with two problems in these cases,—a decision of either one in favor of the petitioners would have entitled them to a decision: One was of purely state law, namely, the claimed existence of a labor dispute which would make the decrees herein improper under the provisions of Section 876-a of the New York Civil Practice Act. The other was: Assuming that there was no labor dispute, did the prohibition of *all* picketing infringe on petitioners' constitutional rights of free speech and free press? The Court of Appeals had to consider *both* of these problems, and decide *both adversely* to petitioners, before the decrees under review could be affirmed. And both, the majority and the minority of that court, did consider and pass upon both questions. The minority held in favor of the petitioners on both questions: while the majority held against petitioners on both ques-

tions,—*the adverse decision on the federal question being absolutely necessary to the affirmance of the decrees under review.*

The Court of Appeals expressly so stated in the supplementary opinion granting petitioners' motion for an amendment of the remittiturs so as to specifically state that the federal question was necessarily passed upon. But even without such specific statement, the very nature of the cases was such that the decrees could not be affirmed on the decision of the question of state law alone, since that merely decided that there was nothing in the state statute making the decrees improper, *but still left open the question whether the decrees did not infringe on petitioners' rights under the First and Fourteenth Amendments to the United States Constitution.*

Needless to say, we do not ask this Court to review the decision of the New York Court of Appeals that these cases did not involve "labor disputes" within the meaning of Section 876-a of the New York Civil Practice Act. That is a question of pure state law with which this Court has no concern. But this Court *is* concerned with, and must review, the question whether or not the prohibition of *all* picketing by a state court infringes upon rights protected by the First and Fourteenth Amendments to the United States Constitution.

POINT III

This Court is not bound by any finding of fact of the state court which is made the basis of a decision infringing upon a federal right.

We have pointed out in our main brief that, as a matter of fact, the decisions under review are not based upon any finding of fact. Counsel for respondents refers to the fact that in one of these cases, the trial court found that one of the pickets had said to a customer that the food in the

particular cafeteria involved in that case was bad. It is a sufficient answer to the claim that the decree in that case was based upon that finding that the decision was the same in the other case, in which there is no such finding. Counsel for the respondents also points to the fact that in the other case, one of the pickets had said to one of the customers that by patronizing that cafeteria he would help Fascism. We respectfully submit that that in itself involves a question of free speech. We believe that it would be a flagrant violation of the right of free speech to prohibit workers engaged in a labor dispute from telling the public, including, prospective customers of the employer, that patronage of such employer would give aid and comfort to Fascists or help the growth of Fascism.

But, we respectfully submit, that even if there were actually findings of fact in both cases upon which the New York courts based their decisions, this Court would be free to examine the record to see whether those findings were well-founded; and it would be for this Court to decide, first, whether the findings were well-founded, and, second, whether, if well-founded, they furnish a proper basis for the decrees under review. This rule, as pointed out in our main brief, is so basic in our constitutional law as to hardly require any extended citation of authority.

In our main brief, we have cited and quoted from a number of cases dealing with the subject, showing the rule to be as old as the question itself. We desire to add here that one of the two cases from this Court cited by counsel for the respondents, a very recent case, reaffirms this rule. In that case this Court held that upon a record containing only the judgment roll this Court will presume that there was substantial evidence to sustain the state court's decree,—clearly implying that when the record of the case is before the Court, this Court will decide for itself the questions of fact as well as the questions of law.

Neblett v. *Carpenter*, 305 U. S. 297.

POINT IV

This Court determines what state of facts warrants the invasion or impairment of the constitutional rights of free speech and free press.

This brings us to the real questions in the case:

First,—*Who is to decide the meaning and extent of the rights of free speech and free press guaranteed by the Constitution?*

Second,—*Has anything been shown in this case which would warrant the glaring invasion of those rights involved in the decrees under review?*

We respectfully submit that there can be only one answer to the first question,—that which has been given by this Court from the very beginning of its existence, namely, that under the Constitution this Court has the ultimate power, as against state courts, to decide the meaning and extent of federal rights as well as all questions of federal law.

Martin v. *Hunter's Lessee*, 1 Wheat. 304,

And the second question must be answered in the negative, since this Court has repeatedly decided that only very grave and serious reasons will justify an invasion or impairment of the rights of free speech and free press. Counsel for the respondents cites the recent case of *Hotel & Restaurant Employees Union* v. *Wisconsin Employment Relations Board*, as if this Court had, in that case, narrowed or in some way detracted from the principles as laid down in the cases cited by us in our main brief. But such is clearly not the case. In that case, as well as in the even more recent *Barnette* case, this Court has not only stood firm upon the principle of the cases cited by us in our main brief, but added to the force of those decisions.

In the *Wisconsin Employment Relations Board Case*, this Court affirmed a decision of the Wisconsin courts which approved a cease and desist order of the Wisconsin Employment Relations Board directed against a labor union. But there is nothing either in the facts or in the opinion of this Court in that case that in any way derogates from the principles contended for here. In that case there was a great amount of violence. But notwithstanding the presence of great violence, the order upheld by this Court did not prohibit peaceful picketing. *And it was because the order did not prohibit peaceful picketing that the decision of the state courts was affirmed by this Court.*

Mr. Justice Frankfurter, in giving the unanimous opinion of this Court, went to great pains to point out, as the *ratio decidendi* of this Court's decision that the highest court of the State of Wisconsin had construed the order in question to be a prohibition of picketing accompanied by violence, and as not in any way impairing the right of peaceful picketing. Said he:

> "The center of attack against the order is that, as enforced by the Wisconsin courts, it enjoins peaceful picketing. * * * What is before us, therefore, is not the order as an isolated self-contained writing, but the order with the gloss of the Supreme Court of Wisconsin upon it. *And that court has unambiguously rejected the construction upon which the claim of the petitioners rests.*
>
> That order forbids only violence, *and that it permits peaceful picketing by these petitioners is abundantly clear by the expressions of the court.*"
>
> *Hotel & Restaurant Employees Union* v. *Wisconsin Employment Relations Board*, 315 U. S. 437, 440-441.

The *Barnette* case,—the last case in which the subject of the First and Fourteenth Amendments was before this Court,—presented a much more serious problem, because

that case involved an act of a state legislature regulating a matter which in itself was clearly one of state regulation. But the very strong considerations militating against interference with a state regulation of a local matter did not weigh in the balance when they collided with the guarantees of the First and Fourteenth Amendments to the United States Constitution. In the opinion in that case, delivered by Mr. Justice Jackson, this Court said:

> "They (i. e., the rights of free speech, free press, free assembly, and free worship) are susceptible of restriction only to prevent *grave and immediate danger* to interests which the state may lawfully protect."
>
> *West Virginia State Board of Education* v. *Barnette*, ... U. S. ....., 87 Law. Ed. 1171, 1179.

The fact that Mr. Justice Jackson delivered the opinion of the Court in that case is significant, since, as pointed out in our main brief, it was some language used by Mr. Justice Jackson in the *Wohl* case that was apparently construed by the New York courts as intended to weaken earlier decisions of this Court, and as a go-ahead signal for the invasion of the constitutional rights involved in the cases under review.

The *Barnette* case was decided by a divided court, but the division was not on the question involved in our cases. This is not only evidenced by the fact that Mr. Justice Frankfurter, who dissented in the *Barnette* case, wrote the unanimous opinion of this Court in the *Wisconsin Employment Relations Board* case, but is also made clear by Mr. Justice Frankfurter's opinion in the *Barnette* case itself, in which he took great care to point out that there was no intention on his part to in any way detract from the force of any decision heretofore rendered by this Court on the subject of free speech and free press. Differentiating carefully between conformity in action and the right to express dissent, he said:

"Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action, while denying its wisdom or virtue, *and with ample opportunity for seeking its change or abrogation.*"

West Virginia State Board of Education v. *Barnette*, ... U. S. ....., 87 Law Ed. 1171, 1187.

It is because free speech and a free press are fundamental necessities of change in law, institutions, or economic conditions, that that right must be carefully guarded against any insidious invasion. The necessity for both in labor disputes, including particularly picketing, has been made a basic principle of our constitutional law by the uniform tenor of the recent decisions of this Court. On that principle we take our stand.

Dated, October, 1943.

Respectfully submitted,

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